APPENDIX A

OPINIONS OF SUPREME COURT OF VIRGINIA

EUNICE S. FOUNTAIN

v.

SPENCER FOUNTAIN

Record No. 8238

November 26, 1973

From the Law and Equity Court of the City of Richmond[1]

Richard L. Williams, Judge

I'Anson, J.

The sole question presented on this appeal is whether our decision in *Surratt, Adm'r* v. *Thompson,* 212 Va. 191, 183 S.E.2d 200, rendered on September 1, 1971, abolishing the inter-spousal immunity doctrine in actions for personal injuries resulting from motor vehicle accidents, should be given retrospective or prospective effect.

Plaintiff, Eunice S. Fountain, sought damages against Spencer Fountain, her husband, and others, for personal injuries sustained on August 11, 1970, when an automobile driven by her husband, in which she was a passenger, collided with a car operated by another.

The trial court held that the *Surratt* decision would be accorded prospective effect only from the time it was rendered, and entered summary judgment for the defendant, Spencer Fountain. We granted plaintiff a writ of error to the judgment.

Plaintiff contends that the rule of *Surratt, supra,* should be given retrospective effect to August 11, 1970, the date of her accident.

[1] Now Circuit Court of the City of Richmond, Division I.

The traditional rule is that a decision abolishing an old common law rule is normally given retroactive effect. *Saffell* v. *Orr*, 109 Va. 768, 774, 64 S.E. 1057, 1059 (1909); Annot., "Prospective or Retroactive Operation of Overruling Decision," 10 A.L.R.3d 1371, 1377-78, 1382-83 (1966); Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va.L.Rev. 201, 205-06 (1965). But the modern rule followed by most courts is to "treat the question of how an overruling decision should operate as one of judicial policy rather than of judicial power, and recognize that varying results may be reached, depending upon the particular circumstances presented and the particular rule affected." 10 A.L.R.3d at 1378, 1383-84; 51 Va.L.Rev. at 206, *et seq.*

We have held in cases involving the criminal area that certain new constitutional rights are accorded only prospective effect. In doing so we followed the criteria pronounced in *Linkletter* v. *Walker*, 381 U.S. 618, 636 (1965), and *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967), namely: that consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. *Bridgers* v. *Commonwealth*, 211 Va. 370, 371, 177 S.E.2d 526, 527 (1970). *See also Cradle* v. *Peyton*, 208 Va. 243, 247, 156 S.E.2d 874, 877 (1967), *cert. denied* 392 U.S. 945 (1968).

The Supreme Court of the United States has " 'recognized the doctrine of nonretroactivity outside the criminal area many times in both constitutional and nonconstitutional cases.' " *Lemon* v. *Kurtzman*, 411 U.S. 192, 197 (1973). There Mr. Chief Justice Burger said:

> "[S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and

> in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of non-retroactivity." 411 U.S. at 199.

The precise question presented in the case at bar has not been before us. But a majority of courts of other jurisdictions that have abolished intra-family immunity have held that their decisions shall have prospective effect only from the date they were rendered because of justifiable reliance on the doctrine by defendants or their insurers. *Darrow* v. *Hanover Township*, 58 N.J. 410, 278 A.2d 200 (1971) (inter-spousal immunity); *Beaudette* v. *Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969) (inter-spousal immunity); *Vickers* v. *Vickers*, 109 N.H. 69, 242 A.2d 57 (1968) (child-parent immunity); *Silesky* v. *Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968) (child-parent immunity); *Gollar* v. *White*, 20 Wis.2d 402, 122 N.W.2d 193 (1963) (parent-child immunity). *But see Gelbman* v. *Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969), which held that the new rule abolishing intra-family tort immunity for non-willful torts should be applied retrospectively to matters which have not gone to final judgment. *Cf. Rigdon* v. *Rigdon*, 465 S.W.2d 921, 923 (Ky.Ct.App. 1971), in which the child-parent immunity rule was abolished and the court held on a rehearing that the new rule would apply from the date of the accident in that case.

The Supreme Court of New Jersey, before deciding in *Darrow*, *supra*, whether *Immer* v. *Risko*,[2] 56 N.J. 482, 495, 267 A.2d 481, 488 (1970), which abrogated the doctrine of inter-spousal immunity in automobile negligence cases,

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[2] Cited and followed by us in *Surratt*, and *Smith* v. *Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971) (child-parent immunity.)

should have retrospective or prospective effect, invited members of the bar and other interested parties to submit briefs and appear as *amici curiae* because of the importance of the question.

In holding that *Immer* should have prospective effect only from the date of the decision, the court reasoned in *Darrow* that there had been justifiable reliance on earlier decisions upholding inter-spousal immunity. Thus it was entirely conceivable that persons would rely on the existing state of the law in determining what financial protection they needed; and that insurance companies providing protection for their insureds also justifiably relied on the existing law in evaluating the risk entailed, the premiums to be charged, and in deciding whether to investigate an accident involving their insureds while the witnesses were available and the facts were fresh on their minds. The court further reasoned that aside from protecting those who justifiably relied on inter-spousal immunity, prospective application of *Immer* would foster stability in the law, "since it would avoid the necessity of opening claims which have gone stale because of a failure to properly investigate. Prospectivity permits the courts to introduce important changes in the law with minimal disruption; it will not affect past conduct or relationships." 58 N.J. at 419, 278 A.2d at 205.

We agree with the reasoning of the New Jersey court and the majority of the other courts that the rule abrogating inter-spousal immunity shall be given prospective effect only from the date of the decision announcing the new rule. Hence we disagree with the contention that the rule in *Surratt* should be given retrospective effect to the date of plaintiff's accident, which occurred nearly a year before our holding in *Surratt*.

For the reasons stated, the judgment of the court below is

Affirmed.

JUNIUS I. JACKSON

v.

EVA VENUS LYLES JACKSON

Record No. 73-0192
November 26, 1973
From the Circuit Court of Lunenburg County
Meredith C. Dortch, Judge

Per Curiam

The question presented in this case is whether the trial court erred in overruling the plea of inter-spousal immunity filed by the defendant, Junius I. Jackson, in an action brought against him by Eva Venus Lyles Jackson, plaintiff, to recover damages for personal injuries sustained by her in an automobile accident which occurred while the parties were husband and wife.

The plaintiff obtained a jury verdict in the amount of $8,000, and judgment was entered thereon.

The material facts show that the parties were married on June 28, 1969; that they were divorced from the bonds of matrimony on November 4, 1971; and that the accident in which the plaintiff sustained personal injuries occurred on August 9, 1970.

This case is controlled by our decision in *Fountain* v. *Fountain*, this day decided. There we held that the rule in *Surratt, Adm'r* v. *Thompson*, 212 Va. 191, 183 S.E.2d 200 (September 1, 1971), abolishing inter-spousal immunity in automobile accident cases, was to be given only prospective effect from the date of the *Surratt* decision. Hence the trial court erred in giving *Surratt* retroactive effect by over-

ruling the plea of inter-spousal immunity and in not dismissing the action.

The judgment of the court below is reversed and final judgment is here entered for the defendant, Junius I. Jackson.

Reversed and final judgment.

APPENDIX B

OPINION OF TRIAL COURT IN JACKSON CASE

Meredith C. Dortch
Judge Thirty-Fourth Judicial Circuit
South Hill, Virginia 23970

September 29, 1972

Re: *Eva Venus Lyles Jackson* v. *Junius Jackson*

The plea of interspousal immunity filed in this case will be denied. Plaintiff's counsel will prepare the proper order. This case is set for trial on October 4 and I will assume that it will be tried on that date.

MEREDITH C. DORTCH

APPENDIX C

JUDGMENTS OF SUPREME COURT OF VIRGINIA

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 26th *day of* November, 1973.

Eunice S. Fountain
against
Spencer Fountain,

Record No. 8238

Upon a writ of error to judgments rendered on the 12th day of October, 1972, the 16th day of October, 1972, and the 17th day of October, 1972, by the Circuit Court of the City of Richmond, Division I, formerly the Law and Equity Court of the City of Richmond.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgments aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgments complained of insofar as they pertain to Spencer Fountain. It is therefore adjudged and ordered that the said judgments, insofar as they pertain to Spencer Fountain, be, and the same are hereby, affirmed, and that the plaintiff in error pay to the said Spencer Fountain thirty dollars damages, and also his costs by him expended about his defense herein.

A writ of error to the aforesaid judgments was refused

as to William T. Tucker, Jr., and John Doe on April 27, 1973.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

/s/ H. G. TURNER
Clerk

Note:

The above order has not been certified to the court below. Execution thereof was stayed on January 4, 1974, pending application for writ of certiorari to the Supreme Court of the United States.

/s/ H. G. TURNER
Clerk

January 4, 1974

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 26th *day of* November, 1973.

Junius I. Jackson,
against
Eva Venus Lyles Jackson,

Record No. 730192

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Lunenburg County on the 20th day of November, 1972.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the

record, that there is error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be reversed and annulled, the verdict of the jury set aside, and that the plaintiff in error recover of the defendant in error his costs by him expended about the prosecution of his writ of error and supersedeas aforesaid here.

And this court proceeding to enter such judgment as to it seems right and proper, doth adjudge and order that the defendant in error take nothing by her motion for judgment, and that the plaintiff in error go thereof without day and recover of the defendant in error his costs in said circuit court expended.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

/s/ H. G. TURNER
Clerk

Note:

The above order has not been certified to the court below. Execution thereof was stayed on January 4, 1974, pending application for writ of certiorari to the Supreme Court of the United States.

/s/ H. G. TURNER
Clerk

January 4, 1974

APPENDIX D

ORDERS OF TRIAL COURT AND ASSIGNMENTS OF ERROR IN FOUNTAIN CASE

ORDER
(Entered October 16, 1972)

On October 5, 1972 came the parties to this action on the Motion for Summary Judgment of defendant Spencer P. Fountain and, having heard argument of counsel and considered the evidence and exhibits, the Court doth sustain said Motion for Summary Judgment and doth Order that this action as to the defendant Spencer P. Fountain be dismissed.

To which action of the Court the plaintiff, Eunice S. Fountain, and the defendants, William T. Tucker, Jr. and John Doe, objected and excepted, upon the grounds that decisions of the Virginia Supreme Court required retrospective application of the change in tort law; that the evidence in this action shows no reliance by defendant Fountain or his insurer upon the law existing prior to September 1, 1971; any prejudice to him or his insurer from lack of investigation of relevant facts, or any adverse effect on insurance rates which would arise out of allowing this action against defendant Fountain, and that to disallow this action against him would deprive plaintiff and defendants John Doe and Tucker of property without due process of law, of equal protection of the laws, and of trial by jury, contrary to the Fourteenth Amendment to the United States Constitution and Section 11 of the Virginia Constitutions of 1902 and 1971 and for other reasons stated by plaintiff's counsel at the hearing of October 5, 1972.

* * *

ORDER
(Entered October 17, 1972)

This day came again the parties, by their attorneys, and came also the jury sworn in this case, pursuant to their adjournment on yesterday, and having fully heard the evidence and argument of counsel were sent out of Court to consult of a verdict and after some time returned into Court with a verdict in the words following, to-wit: "We, the jury, on the issue joined, find for the defendants."

Thereupon the plaintiff, Eunice S. Fountain, by her attorney, moved the Court to vacate the order entered by the Court on October 16, 1972, entering summary judgment for the defendant, Spencer P. Fountain, and to set aside the verdict of the jury on the grounds that this is contrary to the law and the evidence or in the alternative award her a new trial on all issues against the defendants, William T. Tucker, Jr., and John Doe on the grounds that the verdict is contrary to the law and the evidence, for misdirection of the jury by the Court and for other errors committed by the Court during the course of the trial as noted in the Reporter's Transcript of the evidence, which motions the Court overrule.

Therefore, it is considered by the Court that the plaintiff recover nothing of the defendants, William T. Tucker, Jr., and "John Doe," but that the defendants recover of the plaintiff their costs by them about their suit in this behalf expended.

* * *

ASSIGNMENTS OF ERROR

1. The Court erred in sustaining the motion for summary judgment of defendant Spencer Fountain.

2. The Court errred in overruling plaintiff's motion

after verdict to vacate said judgment, and to grant a new trial as to defendant Fountain.

* * *

APPENDIX E

EXCERPTS FROM COMPLAINTS IN SMITH v. KAUFFMAN AND SURRATT v. THOMPSON

MOTION FOR JUDGMENT

1. The infant plaintiff was born Christine Mann on September 7, 1960, daughter of Bobby Ray Mann and Dorothy Mann.

2. On or about April 4, 1963, said Bobby and Dorothy Mann were divorced.

3. The said Dorothy Mann married Raymond B. Smith on March 24, 1964.

* * *

9. *On or about August 18, 1968*, the said Raymond Smith was operating a certain Volkswagen automobile, in which the infant plaintiff was riding, in an easterly direction on State Route 307 near its intersection with State Route 617 in Prince Edward County, Virginia.

* * *

12. As a result of the negligence of said Raymond Smith and the negligence of defendant Randal, said Volkswagen was caused to strike the rear of said Chevrolet automobile with great force and violence.

13. As a direct and proximate result thereof, the infant plaintiff was caused to sustain serious and permanent physical injuries, has suffered great pain of body and mind, has

suffered permanent disability, and her mother has had to expend in the past, and will have to expend in the future, large sums of money for hospital, doctors and related medical expense in an effort to cure her of said injuries.

* * *

MOTION FOR JUDGMENT

The plaintiff moves the Court to enter judgment against the defendants in the sum of $40,000.00 by virtue of the following facts:

1. That on or about the *23rd day of June, 1968*, at about 1:00 o'clock P.M., the plaintiff's decedent, Cordelia Jane Surratt, was a passenger in a motor vehicle driven by her husband, the defendant, Oscar Lee Surratt, which vehicle was proceeding in a southwesterly direction upon U.S. Highway No. 221 toward the Town of Hillsville in Carroll County, Virginia, about 6 miles northeast of said Town of Hillsville, and in the proximity of the bridge crossing Big Reed Island Creek.

* * *

7. That the defendant, Oscar Lee Surratt, owed a duty to the plaintiff's decedent not to pass another vehicle at the intersection of highways, to maintain a proper lookout, to drive his vehicle at a reasonable speed under all circumstances and to maintain said vehicle under proper control; and,

8. That the defendant, Oscar Lee Surratt, failed to carry out said duties to the plaintiff's decedent, which amounted to gross negligence upon his part, and that as a proximate result of the gross negligence of the defendant, Oscar Lee Surratt, the plaintiff's decedent was killed;

* * *

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LIBRARY,
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 15 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN AND EVA L. JACKSON,

Petitioners,

v.

SPENCER FOUNTAIN AND JUNIUS I. JACKSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

J. SEGAR GRAVATT
105 East Elm Street
Blackstone, Virginia

W. E. NEBLETT
Lunenburg, Virginia

J. B. BROWDER
RUFUS G. COLDWELL, JR.
Browder, Russell, Little, Morris & Butcher
1510 Ross Building
801 East Main Street
Richmond, Virginia 23219

Counsel for Appellees

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In The

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October Term, 1973

No. 73-1282

EUNICE S. FOUNTAIN AND EVA L. JACKSON,

Petitioners,

v.

SPENCER FOUNTAIN AND JUNIUS I. JACKSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

For reasons hereinafter stated, the respondents respectfully submit that this Court should deny the Petition for Writs of Certiorari in this case.

OPINIONS BELOW

Opinions below are reported, *Fountain* v. *Fountain,* 214 Va. 347, 200 S.E.2d 513, *Jackson* v. *Jackson,* 214 Va. 351, 200 S.E.2d 515 and are printed in the petitioner's Appendix.

QUESTION PRESENTED

Is the Fourteenth Amendment to the Constitution of the United States violated when the highest state court, by opinion dated September 1, 1971, overrules the former com-

mon law immunity of spouses from suits against each other for negligent injury by motor vehicle and allows a plaintiff in the overruling case to recover against her husband for such injuries suffered in 1968 and subsequently decides that the overruling decision shall be given prospective effect as to all other spouses?

RELEVANT FACTS

The only facts relevant to resolve the question presented are the following:

In *Surratt* v. *Thompson*, 212 Va. 191, 183 S.E.2d 200 (Sept. 1, 1971) overruling interspousal immunity, the plaintiff, who was allowed to recover, was injured on June 23, 1968 and in the companion case of *Smith* v. *Kauffman*, 212 Va. 181, 183 S.E.2d 190 (Sept. 1, 1971), the child, allowed to recover against its parent, was injured on August 18, 1968.

By virtue of the decision of the Supreme Court of Virginia in *Jackson* v. *Jackson, supra*, and *Fountain* v. *Fountain, supra*, both rendered on November 26, 1973, the Supreme Court of Virginia declared that only spouses injured after the date of its opinion should enjoy the benefits derived from its decision overruling the doctrine of immunity.

The plaintiff in *Jackson* was injured on August 9, 1970 and the plaintiff in *Fountain* was injured on August 11, 1970.

ARGUMENT

It is the contention of the petitioners that the Supreme Court of Virginia should have given limited retroactive effect to its decision in *Surratt* v. *Thompson, supra*, so as to include the two plaintiffs in this case who were injured

in August, 1970 and to permit them to recover against their spouses.

In *Sperry & Hutchinson Co.* v. *Rhodes,* 220 U.S. 502 (1911), New York enacted a statute making it unlawful to use a person's photograph for advertising without his consent. A damage suit was instituted under this statute for the unlawful use of the plaintiff's photograph. The defendant claimed in the Supreme Court that photographs taken before the date of the enactment of the statute could be used without the consent required by the statute.

Mr. Justice Holmes, in disposing of the contention, stated "But the Fourteenth Amendment does not forbid statute or statutory changes to have a beginning and thus to discriminate between the rights of an earlier and a later time."

The decision of this Court in *Great Northern R. R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932), decided the question here before the Court. In that case a Minnesota statute empowered its railroad commission to fix freight rates for intrastate shipment. Such rates could be changed by the board itself or upon complaint of either shipper or carrier, if found to be unreasonable.

The Supreme Court of Montana considered this statute in a prior decision *Doney* v. *Northern P. R. Co.,* 60 Mont. 209, 199 Pac. 432 (1921) and the Court there held that recovery by a shipper of unreasonable rates was permitted under the statute but that application had to be made to the board or a suit instituted against the board for determination of the unreasonable nature of the rate and that this was a condition precedent to the institution of a suit for recovery of excess charges.

Subsequently Sunburst Oil Company followed the procedure required by the prior decision and procured a ruling of the Railroad Commission holding certain rates charged by Northern Pacific unreasonable and thereafter Sunburst

filed suit to recover charges for the period August, 1926 through August, 1928.

The Supreme Court of Montana held that its ruling in *Doney* was erroneous in that a determination of the commission or the Court that a rate was unreasonable would not give a right to recover for past excessive charges but nonetheless it held that *Doney* was applicable law until reversed and granted a judgment in favor of Sunburst for the excess payment from 1926 through 1928.

Great Northern brought the case to the Supreme Court raising the question ". . . whether the annulment by retroaction of rates valid when exacted is an unlawful taking of property within the Fourteenth Amendment." 287 U.S. at 359. Upon this issue the Court spoke through Mr. Justice Cardoza in authoritative language giving complete latitude for the highest state court to make its own choice as to the application of its overruling decision without Constitutional restraint:

> "We think the posture of the case from the viewpoint of the constitutional law was the same after the decision of the appeal as it was after the trial. There would certainly have been no denial of due process if the court in affirming the judgment had rendered no opinion or had stated in its opinion that the Doney Case was approved. The petitioner is thus driven to the position that the Constitution of the United States has been infringed because the Doney Case was disapproved, and yet, while disapproved, was followed. Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is said to be a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future.
>
> "We have no occasion to consider whether this division in time of the effects of a decision is a sound or

an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal constitution. This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. (citations omitted) This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

"We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions. Indeed, there are cases intimating too broadly (citation omitted) that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. (citations omitted) On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. (citations omitted) The alternative is the same whether the subject of the new decision is common law or statute. (citations omitted) The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of the law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring com-

> mon law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process." 287 U.S. at 363-366.

In *Moliter* v. *Kaneland Comm. Unit District*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), the Supreme Court of Illinois abolished its former rule making school districts immune from liability for negligent torts. After declaring that it had a free choice to make its decision retroactive or prospective in operation, it granted the plaintiffs, in the overruling case, judgment and declared its decision otherwise prospective only. This Court denied certiorari.[1]

The Court below in its opinion cited *Linkletter* v. *Walker*, 381 U.S. 618. The petitioner suggests that *Linkletter* v. *Walker* is not apt authority for the question here before the Court. (Pet. br. pp. 7 and 8) We disagree.

This Court having decided *Mapp* v. *Ohio*, 367 U.S. 643, requiring the exclusion in state criminal trials of evidence

[1] Numerous cases making the overruling decision applicable to its parties but prospective as to all others are collected and discussed in *Annotation Overruling Decision—Application*, 10 A.L.R.3d 1371, § 8(b) 1395.

seized in violation of the search and seizure provisions of the Fourth Amendment thus reversing *Wolf* v. *Colorado*, 338 U.S. 25, was dealing with a situation which raised a similar question to that here before the Court.

Linkletter was convicted in a Louisiana State Court on May 28, 1959. *Mapp* v. *Ohio* was announced on June 19, 1961. Linkletter sought a writ of habeas corpus in the state courts and through the lower federal courts and was denied and the case came to this Court. In deciding *Mapp* v. *Ohio*, the Court applied its new rule to Mapp and overruled his conviction. It refused to give *Mapp* general retroactive effect stating "In short, we must look to the purpose of the Mapp ruling; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of of a retroactive application of Mapp." 381 U.S. at 636.

The majority opinion closes with these words:

> "Nor can we accept the contention of petitioner that the Mapp rule should date from the day of the seizure there, rather than that of the judgment of this Court. The date of the seizure in Mapp has no legal significance. It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date. In the light of the cases of this Court this is the better cutoff time." 381 U.S. at 369.

thus rejecting a contention similar to that here made that the cutoff time should be the date of the injuries of these two plaintiffs rather than the date upon which the Supreme Court of Virginia announced the decision abolishing the former rule. Bearing in mind that Linkletter was convicted in a state court, the provisions of the Fourteenth Amendment applied.

The dissenting opinion of Mr. Justice Black clearly shows that this Court considered a factual situation almost iden-

tical to those here presented with respect to the Fourteenth Amendment rights of these petitioners and rejected them.

> "Linkletter, convicted in the state court by use of 'unconstitutional evidence,' is today denied relief by the judgment of this Court because his conviction became 'final' before Mapp was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's is free. This different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of Mapp by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961." 381 U.S. 641.

The foregoing and much more is said in the dissenting opinion with respect to the discrimination between Mapp and Linkletter but the Court did not accept these contentions of Fourteenth Amendment inequality.

In the majority opinion, the Court discussed the historica background of retroactive application of overruling decisions and the changes in those rulings which have taken place and concluded:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. 629.[2]

[2] Later cases making a similar declaration of freedom to apply an overruling decision retrospectively or prospectively are *Tehan* v. *U.S.*, 382 U.S. 406 (1966), reh. den. 383 U.S. 931; *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) reh. den. 385 U.S. 890; *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964); and *James* v. *U.S.*, 366 U.S. 213 (1961); *Desist* v. *U.S.*, 394 U.S. 244 (1969) and see *Stovall* v. *Denno*, 388 U.S. 293 (1967) suggesting that Article 3

Facts Supporting Lower Court Policy

This Court has stated broadly the criteria which should be followed in determining the retroactive application of a new rule:

(1) The purpose to be served;

(2) The extent of reliance; and

(3) The effect on the administration of justice.

Linkletter v. *Walker, supra; Tehan* v. *U.S., supra; Stovall* v. *Denno, supra; Desist* v. *U.S., supra.*

I.

THE PURPOSE TO BE SERVED

The opinions in *Smith* v. *Kauffman, supra,* and *Surratt* v. *Thompson, supra,* were companion opinions. *Smith* v. *Kauffman,* being the more extensive in its recitation of the changes which brought about the abolishment of the doctrine of parental and interspousal immunity, describes these changes:

> "The enactment of Virginia uninsured motorists laws in 1958 has effected a further and major change of circumstances. One of these laws requires an uninsured motor vehicle endorsement to each policy of automobile liability insurance issued or delivered by an insurer licensed in this State covering a motor vehicle principally garaged or used in this State. Va. Code Ann. § 38.1-381 (1970). Under the endorsement, the insurer must agree to pay to the insured all sums that he may be legally entitled to recover as damages from the owner or operator of an uninsured motor

of the Constitution requiring the Court to resolve issues solely in concrete cases and controversies militates against making a new rule purely prospective so as not even to apply in the case in which it is announced.

vehicle or unknown operator of a motor vehicle, within the limits prescribed by statute: $20,000 for bodily injury to or death of any one person and $30,000 for bodily injury to or death of two or more persons in any one accident, and $5,000 for damage to property in any one accident. Va. Code Ann. §§ 38.1-381(b) (1970) and 46.1-1(8) (Supp. 1971).[3]

"A complementary law, first enacted in 1958, encourages the obtaining of insurance coverage by requiring that every person who seeks registration of an 'uninsured motor vehicle' pay a $50 fee to the State Uninsured Motorists Fund. This fee must be paid as a prerequisite to registration of a motor vehicle unless the vehicle has liability insurance coverage up to the limits described in the preceding paragraph or unless the owner (i) qualifies the vehicle as an 'insured motor vehicle' by giving a bond or depositing cash or securities in lieu of insurance or (ii) qualifies as a self-insurer. Va. Code Ann. §§ 46.1-167.2(b) (1967), -395 (1967), -504 (Supp. 1971). According to the records of the State Division of Motor Vehicles, only 1.57% of the motor vehicles registered in Virginia are 'uninsured motor vehicles.'[4]

"The very high incidence of liability insurance covering Virginia-based motor vehicles, together with the mandatory uninsured motorist endorsements to insurance policies, has made our rule of parental immunity anachronistic when applied to automobile accident litigation. In such litigation, the rule can be no longer supported as generally calculated to promote the peace and tranquillity of the home and the advantageous disposal of the parents' exchequer. A rule adopted for the common good now prejudices the great majority." 212 Va. 184, 185.

It therefore appears that the changes which developed over a period of time resulting in the almost universal in-

surance coverage referred to in the opinion makes prospective application fulfill the *purposes of the Court.*

Additionally, to go back in retrospect and fix a time when the prevalence of motor vehicle insurance outweighed the family harmony and financial considerations supporting family immunity would be extremely difficult and the fixing of a standard by which to determine that time would be wholly impractical, which suggests an extremely practical and important reason supporting the purpose of the abolishing decision by prospective application.

II.

THE EXTENT OF RELIANCE

The *extent of reliance* upon past law also supports a prospective policy. The evidence offered to the Court shows that insurance rates from year to year are based upon the incidence of loss of the immediately preceding year. Thus, to permit litigants of claims formerly thought to be barred would result in an increased burden in the form of insurance rates upon automobile operators in later years. It is apparent that injuries formerly barred would be given new life by retroactive application of the overruling decision. This would obviously result in the institution of many stale claims which had never been investigated and in which the evidence has disappeared, resulting in unfair, unjust and fraudulent claims.

In this connection, it makes no difference whatever that the petitioner says that one of the occurrences involved was investigated by the liability insurance carrier. The Court, in determining retroactive or prospective application, has to consider conditions and the interest of society in general rather than any particular accident or any particular litigant. Thus, prospective application gives regard to past reliance of the public upon the immunity involved.

III.

The Effect On The Administration Of Justice

The impact upon the *administration of justice* of retroactivity was recognized by the Supreme Court of Virginia in *Fountain* v. *Fountain, supra,* where it held that "stability in the law" would be fostered by prospectivity which would avoid the necessity of opening claims which have gone stale because of a failure to properly investigate.

Summary

So that prospective application is supported by the purpose of the Court to meet the changed conditions resulting from recent *universal public liability insurance* and other changes in Virginia motor vehicle insurance law, by *past reliance* upon the old rule and by the unknown *results upon the administration of justice* of the new rule.

The Equal Protection Argument

The simplest answer here is that Christine Marie Smith, an infant in *Smith* v. *Kauffman, supra,* and Mrs. Surratt's administrator in *Surratt* v. *Thompson, supra,* are unique legal entities. No other person can possibly be the plaintiff in the action in which the Supreme Court of Virginia overruled the common law doctrine of interspousal immunity and of parental immunity with respect to negligent injuries by motor vehicles. Neither Eunice S. Fountain nor Eva L. Jackson can claim to occupy that position and for either of them to attempt to do so as they here seek is pure fiction without substance.

It may be true that some courts have granted limited retroactivity based upon the date of the occurrence giving rise to suit in the overruling cases. The logic and reason of such decisions as to the "cutoff date," whatever it may be,

has no application to these cases. There is no more reason to pick August, 1968 as the cutoff date than to pick August, 1969 or August, 1967. As the Court said in *Linkletter*, "it was the judgment of this Court that changed the rule and the date of that opinion is the crucial date." 381 U.S. 639.

When new statutes are enacted or when new judicial decisions changing old rules are announced, necessarily somebody is affected for good and for bad by the date on which the change is made. Unless a better reason can be given than simply to say that the date chosen hurts me and affects my rights, then the date upon which the change is made must be binding upon all. This in substance is what the petitioner's argument resolves itself to.

Many courts have granted retroactive effect to an overruling decision as was done by the Supreme Court of Virginia in *Surratt* and *Smith*. Courts having no jurisdiction to render advisory opinions and only authorized to decide cases or controversies as is the Supreme Court of Virginia have granted retroactive effect to the parties to the overruling case saying that otherwise their decision would be merely dictum and an advisory decision.

Others have granted retroactive effect to the parties prevailing upon the theory that those litigants bringing about the change should be rewarded for their creative effort and expense in challenging the old rule thus lending vitality to the power of the Court to keep pace with changing conditions which require reconsideration of old principles.

Each is based upon reason and upon logic and each is applicable to the overruling decision in *Smith* v. *Kauffman* and *Surratt* v. *Thompson*. How the various courts have dealt with this problem is the subject of discussion in *Overruling Decision—Application*, 10 A.L.R. 3rd 1371, §§ 8(b), 8(c) and 8(d). A similar annotation of the Supreme Court decisions as they have dealt with the problem

is found at *Supreme Court Decision—Retroactivity,* 22 L.Ed. 2d 821, § 5.

CONCLUSION

No Fourteenth Amendment rights of the Petitioners have been violated by the application of these overruling decisions to the parties thereto and in making the decisions prospective only as to all other parties. This Court should not entertain the idea that it can fix a better date for the prospective application of overruling decisions of the Supreme Court of Virginia than the date upon which the decisions were announced. There is no precedent for such action and there is no provision of the Constitution of the United States requiring it. The petition herein should be denied.

Respectfully submitted,

J. SEGAR GRAVATT
Of Counsel for Appellees

J. SEGAR GRAVATT
105 East Elm Street
Blackstone, Virginia

W. E. NEBLETT
Lunenburg, Virginia

J. B. BROWDER
RUFUS G. COLDWELL, JR.
Browder, Russell, Little, Morris & Butcher
1510 Ross Building
801 East Main Street
Richmond, Virginia 23219

Counsel for Appellees